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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CENTER ASSOCIATES, Plaintiff and Respondent, v. WILLIAM ALTMAN, et al., Defendants and Appellants.	D051583 (Super. Ct. No. GIC860833)

APPEAL from an order of the Superior Court of San Diego County, Patricia A. Y. Cowett, Judge. Affirmed; judicial notice denied.

This appeal challenges an order denying a motion, brought by a group of defendants, for an award of attorney fees as costs, after the complaint naming them was involuntarily dismissed for lack of service of all indispensable parties. (Code Civ. Proc., §§ 1032, 1033.5.) Defendants and appellants, William Altman, et al. (29 persons, referred to as appellants), are among the homeowners of 48 units in a condominium project, all of whom were sued by the owners of nearby property, plaintiff Center

Associates, L.P. (respondent), for declaratory relief to interpret the governing documents affecting the homeowners' property by, in part, establishing their easement rights over certain property owned by plaintiff. Appellants seek reversal of the trial court's order denying their request for fees, pursuant to Civil Code section 1717,[1] under an attorney fees provision in the governing documents.

We reject appellants' contentions that the trial court erred or abused its discretion in denying their motion for attorney fees. Appellants do not at this time qualify under the definitions in section 1717, subdivision (b)(1), as prevailing parties on the contract who are therefore entitled to an award of attorney fees as costs. The trial court correctly applied the statute and we affirm the order denying attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

A. Nature of Proceedings

This litigation involves a dispute between neighboring owners of property in the area of the Sea Canyon residential development in Clairemont (the condo project). The condo project is governed by the restated master declaration of covenants and conditions (here, CC&R's; recorded on May 5, 1992). This document includes an attorney fees clause, and refers to a total of six adjacent lots. The 48 residential units are located on lots 5 and 6. Appellants are 29 individually named defendants who own over one-half of

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1 All further statutory references are to the Civil Code unless noted.

the 48 units in the project.[2] Access to their property, parking, and utilities are provided by easements over lot 4. The residential units have no public street frontage.

Originally, lot 4 was owned by the condo project's homeowners' association. Lot 4 was transferred to respondent, pursuant to arrangements in the CC&R's, and subject to easements and conditions such as appellants' access rights. In addition to lot 4, respondent (a developer) owns commercial property adjacent to the homeowners' property, on lots 1, 2 and 3. Respondent wants to redevelop its commercial buildings located on lots 1, 2 and 3.

In February 2006, respondent brought this action to obtain a judicial determination of rights and duties under the CC&R's, with respect to certain disputes about the residential property owners' easement rights over lot 4, since the proposed construction would affect those rights. (Code Civ. Proc., § 1060 et seq.) The CC&R's were attached as an exhibit to the declaratory relief complaint.

B. Respondent's Efforts to Serve All Homeowners; Dismissal

After filing the action, respondent conducted discovery and investigations to ascertain the identity of all of the homeowners in the project. It was able to serve a number of the defendant homeowners with its summons and complaint, but was unable to serve others. Mediation efforts took place but they were unsuccessful. In January 2007,

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[2] Other owners in the development are not parties on appeal: Defendants Sea Canyon Homeowners' Association, represented by Jeffrey C. Bloom, and defendant Eva Marie Lenberg (aka Bradley), represented by Elizabeth F. Bradley. They were also awarded costs only, but do not appeal the denial of their attorney fees.

respondent voluntarily dismissed several of the named defendants that it had been unable to serve.

At a status conference in February 2007, appellants brought a motion to dismiss the complaint for failure to name and serve all indispensable parties. The trial court indicated that more service efforts should be made. Respondent complied, but apparently did so without obtaining relief from its previously made voluntary dismissals. Ultimately, in March 2007, the trial court determined at the continued status conference that not all of the indispensable parties had been served. It accordingly dismissed the entire complaint without prejudice, effective March 27, 2007.

C. Subject Motion for Fees; Hearing; Ruling

Following the dismissal of the complaint, appellants filed their cost memorandum. In May 2007, they also sought an award of attorney fees in the amount of $40,375, on the ground that they were prevailing parties on the contract issues within the meaning of section 1717.

Respondent brought a motion to tax those costs, and opposed the motion seeking an award of attorney fees. Although respondent's opposition was filed late, the trial court declined to strike it, and the matter went to oral argument after a tentative ruling was issued.

In its tentative ruling, the trial court included language discussing an unpublished case, of which judicial notice had been requested. (*N.R., a minor, v. San Ramon Valley Unified School District*, Case No. C 05-04441 SI, 2006 U.S. Dist. Lexis 47287.) At oral

argument, the parties discussed whether that was appropriate authority on which to rely, and the trial court stated that it would "excise" that reference from its ultimate ruling.

The same day as the oral argument was held, June 29, 2007, respondent filed a new complaint under a new case number against these defendants. The new action also named several new defendants who had been located as owners of units within the condo project. In general, respondent made the same, but also additional, allegations about the proper interpretation of the CC&R's with respect to easement rights.[3]

The final order on the fees motion, issued after oral argument, relied upon the relevant portions of section 1717 and upon California Supreme Court authority, *Hsu v. Abbara* (1995) 9 Cal.4th 863, 876 (*Hsu*). The court concluded that in view of the procedural nature of the dismissal of the complaint, a contractual attorney fee award was not justified. Appellants were deemed not to have prevailed on the contract, "nor have they obtained a final resolution of the contract claims asserted herein. This action was dismissed, without prejudice, as a result of Plaintiff's procedural failure to locate and serve all of the indispensable homeowners. As such, the Court exercises its discretion

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[3] Pending this appeal, respondents filed a request for judicial notice of the pleadings in the new action, both the original and amended complaints. (*Center Associates v. Altman et al.*, SDSC, No. 37-2007-00069346-CU-MC-CTL.) That request has been deferred to the panel deciding this appeal and we will address it in due course. Also pending this appeal, we stayed this case while we decided a separate attorney disqualification petition for writ of mandate involving the same parties and counsel. (D053469, filed Nov. 4, 2008.) We granted the petition that challenged the trial court's disqualification of the Procopio, Cory, Hargreaves & Savitch firm from continued representation of respondent Center Associates. In this appeal, Procopio continues to represent respondent. Accordingly, the matter was restored to our oral argument calendar.

and holds that Defendants should not be awarded its attorney's fees at this time." The court therefore determined:

> "While attorney's fees are recoverable costs under CCP § 1033.5 when authorized under a contract, such as the [CC&R's], in this action there is no prevailing party under the contract. Thus, attorney's fees are not a recoverable cost."

Thus, the court denied the request for attorney fees but awarded appellants (and the other homeowner defendants) their reasonable costs incurred, such that respondent's motion to tax costs was granted in part and denied in part. These appellants received $9,680 in costs (first appearance fee and motion filing fees). (Code Civ. Proc., §§ 1032, 1033.5.)

After following procedures for requiring a notice of ruling (by respondent) and then dealing with appellants' objections thereto, the court issued its final order denying the various defendants' motions for recovery of attorney fees. The record has been augmented with an accurate version of the order, which includes a table showing the results of respondent's efforts to serve the various homeowners. Appellants filed their notice of appeal.

DISCUSSION

I

INTRODUCTION AND PRELIMINARY ISSUES

Before we address appellants' substantive theory of why they should be considered to be prevailing parties on the contract, we first dispose of several preliminary procedural points. Appellants have no basis to contend that the format and text of the order show

any erroneous reliance by the trial court upon unpublished case authority. The record clearly reflects that although such a citation was included in the tentative ruling, the court repudiated it and expressly excised it, during the discussion at oral argument. Appellants nevertheless contend in a circular manner that since the tentative ruling was confirmed, any errors it contained should also have been included in the formal order; however, the record is otherwise.

Moreover, the trial court's operative order fully outlined its reasoning, including the statutory terminology and case authority interpreting it. (§ 1717; *Hsu, supra,* 9 Cal.4th 863, 876.) In any case, it is the correctness of the order, not the reasoning process, which we evaluate on appeal.

Next, with respect to respondent's request for judicial notice pending appeal, it seeks to present us with the new versions of the complaints, in the new action, through which respondent continues to seek an interpretation of the governing documents. However, we deny the request, as it is not necessary for this court to consider such documents in order to analyze whether the subject procedural dismissal of the current action, as shown in the record, should properly support an award of contractual attorney fees under section 1717. Respondent's attorney declaration supporting the judicial notice request states that the complaint in the new action was placed in this superior court file, but our record indicates only that the trial court was told it was forthcoming. Even though the new action was apparently filed on the same day as the trial court held oral argument, its pleadings are not necessary for a full consideration of these issues on the current record.

II

APPLICABLE AUTHORITIES

Section 1717, subdivision (a) provides that a party "who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." Under subdivision (b)(1), the trial court is to "determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section." (In the referenced paragraph (b)(2), an exception not involved here is created with respect to actions that were voluntarily dismissed or settled; § 1717, subd. (b)(2).)

To decide whether a party has prevailed on the contract claims, "the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.' " (*Hsu, supra*, 9 Cal.4th 863, 876.)

A proper reading of section 1717 will recognize that parties whose litigation success is not fairly disputable are entitled to claim attorney fees as a matter of right under that section, but it will also allow the trial court to retain a measure of discretion to

find there is no prevailing party, when the results of the litigation are mixed. (*Hsu, supra,* 9 Cal.4th 863, 876.) An appellate court will reverse such an exercise of discretion only if it has been abused. (*Id.* at pp. 871, 877; *Smith v. Krueger* (1983) 150 Cal.App.3d 752, 757.) This statute requires the court, in determining whether there is a prevailing party on the contract, to look at whether the statutory conditions have been satisfied. (*In re Estate of Drummond* (2007) 149 Cal.App.4th 46, 50 (*Drummond*).)

In *Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796, 807 (*Otay*), this court considered the application of contractual attorney fees principles under section 1717 in the procedural context of a "discrete legal proceeding" that was before the trial court, in the form of a petition to compel arbitration under a clause in an agreement that coordinated other contracts. In that case, one of the parties to the coordination agreement sought to compel arbitration, but was unsuccessful. The opposing party sought attorney fees under section 1717, as a prevailing party on the arbitration petition only. This court decided that attorney fees were available to that party, since it had effectively defeated the petition to compel arbitration and thereby obtained "a ' "simple, unqualified win" ' on the only contract claim at issue in the action-whether to compel arbitration under the Coordination Agreement. [Citation.] Accordingly, [opposing party] was the prevailing party as a matter of law because it defeated the only contract claim before the trial court in this discrete special proceeding. [Citation.]" (*Otay, supra,* at p. 807.) We rejected a contention that this party had obtained merely "an interim procedural victory," since the overall merits of the various contracts remained to be determined. Rather, the petition to compel arbitration was

severable from the remaining contract issues, for purposes of awarding contractual attorney fees on the petition. (*Ibid*.)

In *Otay*, we supported our conclusions by relying on other case authority in which contractual attorney fees have been awarded to a prevailing party that obtained an appealable order or judgment in a discrete legal proceeding, even though other related litigation on the merits was not finally concluded (citing, e.g., *Drummond*, *supra*, 149 Cal.App.4th 46, 52-53). Where, as in the context of a petition to compel arbitration, a party obtains a favorable order that is a "final resolution of a discrete legal proceeding," an attorney fees award for that prevailing party may be appropriate, since that party has prevailed on a contractual issue that was fully resolved in that separate proceeding. (*Otay, supra*, 158 Cal.App.4th at p. 807.)

III

ANALYSIS

In our case, appellants mainly contend the trial court abused its discretion in interpreting the statute, and argue that respondent has not yet obtained any contract interpretation in its favor, whereas appellants have now obtained a very good result, i.e., dismissal. They rely on cases in which a procedural dismissal can justify contractual attorney fees, such as *Elms v. Builders Disbursements, Inc.* (1991) 232 Cal.App.3d 671, 674-675 (i.e., a dismissal for lack of prosecution) or *Winick Corp. v. Safeco Insurance Co.* (1986) 187 Cal.App.3d 1502, 1508 (a dismissal for lack of timely return of summons). In those cases, the defendants in contract-based actions had obtained dismissals with prejudice, which effectively defeated any recovery by the plaintiffs on the

only contract claims in the action. Those defendants were entitled to be awarded fees as the party prevailing on those contracts, as a matter of law under section 1717. The theory of those cases was that the defendants had prevailed because the plaintiffs' contract claims were completely thrown out. It did not matter that those dismissals were procedural in nature, for lack of prosecution, etc., because those plaintiffs' claims could not survive, to be reasserted in another forum or action. The defendants in *Elms* and *Winick* were therefore the parties that recovered "greater relief" in the actions on the contract.

In contrast, the procedural dismissal in this case was made without prejudice and was based on technical grounds that did not in any way affect the merits or viability of the subject contract claims. It is well established that the prevailing party for an award of costs under Code of Civil Procedure section 1032 (i.e., a party prevailing in an action), is not necessarily also the prevailing party under section 1717, for purposes of prevailing on contract issues such as whether an award of contractual attorney fees would be warranted. (*McLarand, Vasquez & Partners, Inc. v. Downey Savings & Loan Assn.* (1991) 231 Cal.App.3d 1450, 1456.) Instead, the proper inquiry under section 1717 should be whether one or the other of the parties "recovered a greater relief in the action on the contract," or whether at a certain point in the proceedings, "there is no party prevailing on the contract for purposes of this section." (§ 1717, subd. (b)(1).)

The point of respondent's complaint was to obtain an interpretation of the rights and duties of the parties under the CC&R's, regarding easements and access. We can determine from the current record only that no one has yet prevailed on the merits of the

substantive issues argued concerning the CC&R's, with respect to the easement disputes. Appellants misapply the rules set forth in *Hsu*, because appellants have not actually obtained all their desired litigation objectives, as disclosed by the pleadings and the other proceedings that have occurred thus far (e.g., status conferences). In *Hsu*, the court expressly stated: "The prevailing party determination is to be made only upon *final resolution of the contract claims* and only by 'a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.' " (*Hsu*, *supra*, 9 Cal.4th 863, 876; italics added.) No such "final resolution" of the contract claims has yet occurred in our case, but only the predictable result of service problems, i.e., a dismissal without prejudice.

Otay, *supra*, 158 Cal.App.4th at page 807, is distinguishable, because here, appellants have not obtained, in a separate and discrete proceeding, any " 'simple, unqualified win' " on a particular contract claim presently at issue. By comparison, the dismissal without prejudice of the complaint does not conclusively show that appellants have prevailed on the merits of a severable contractual issue (e.g., arbitrability), for purposes of awarding contractual attorney fees. (*Ibid*.)

As expressed in *Drummond*, appellants in this case have obtained only an "interim" victory, directly because of the difficulties encountered by this respondent in finding and serving all indispensable parties. (*Drummond*, *supra*, 149 Cal.App.4th 46, 51-52.) It cannot be determined as a matter of law in this case that respondent will be completely unable to carry out such a task, nor that appellants' interim or procedural victory will become permanent, nor that it will evolve into a final resolution of the

substantive claims based on the CC&R's. Here, as in *Drummond*, "Appellants have at no time won a victory 'on the contract.' They have only succeeded at moving a determination on the merits from one [courtroom] to another." (*Id*. at pp. 52-53.) "By achieving that result, appellants no more 'prevailed' than does a fleeing army that outruns a pursuing one. Living to fight another day may be a kind of success, and surely it is better than defeat. But as long as the war goes on, neither side can be said to have prevailed." (*Id*. at p. 53.)

The trial court had an ample basis in this record to exercise its discretion to determine that the statutory conditions for an award of attorney fees had not been satisfied, and there was no prevailing party at the time of this ruling. (§ 1717, subd. (b)(1).)

DISPOSITION

The order is affirmed. Costs on appeal to respondent.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

IRION, J.